



## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-90705; File No. SR-FINRA-2020-035]

### **Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving a Proposed Rule Change to Amend the FINRA Codes of Arbitration Procedure to Increase Arbitrator Chairperson Honoraria and Certain Arbitration Fees**

December 17, 2020.

#### **I. Introduction**

On October 16, 2020, the Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend the Code of Arbitration Procedure for Customer Disputes (“Customer Code”) and the Code of Arbitration Procedure for Industry Disputes (“Industry Code”) (together, “Codes”) to increase arbitrator chairperson (“Chair”) honoraria. Specifically, the proposed rule change would: (1) increase the additional hearing day honorarium Chairs receive for each hearing on the merits from \$125 to \$250 and (2) create a new \$125 Chair honorarium for each prehearing conference in which the Chair participates. Under the proposed rule change, these increases would be funded primarily by certain increases to the member surcharge and process fees for claims of more than \$250,000 or claims for non-monetary or unspecified damages. The proposed rule change would also increase filing fees and hearing session fees for customers, associated persons and members bringing claims of more than \$500,000 or claims for non-monetary or unspecified damage.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

The proposed rule change was published for comment in the Federal Register on October 26, 2020.<sup>3</sup> The public comment period closed on November 16, 2020. The Commission received one comment letter in response to the Notice.<sup>4</sup> On December 9, 2020, FINRA consented to an extension of the time period in which the Commission must approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change to December 31, 2020.<sup>5</sup> This order approves the proposed rule change.

## II. Description of the Proposed Rule Change

FINRA makes arbitrator honoraria payments to its arbitrators for the services they provide to FINRA's dispute resolution forum. Currently, under FINRA Rule 12214(a)(1), arbitrators receive \$300 for each hearing session in which the arbitrator participates.<sup>6</sup> In recognition of their increased experience and the extra responsibilities they must perform during an arbitration,<sup>7</sup> Chairs currently receive an additional \$125 for serving as Chair during a hearing ("hearing day honorarium").<sup>8</sup> The Chair receives the additional honorarium for each hearing

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<sup>3</sup> Exchange Act Release No. 90227 (Oct. 20, 2020), 85 FR 67794 (Oct. 26, 2020) (File No. SR-FINRA-2020-035 ("Notice")).

<sup>4</sup> Letter from the Steven B. Caruso, Maddox Hargett Caruso, P.C., dated October 20, 2020 ("Caruso Letter"), available at <https://www.sec.gov/comments/sr-finra-2020-035/srfinra2020035-7927147-224628.htm>.

<sup>5</sup> See letter from Mignon McLemore, Assistant General Counsel, Office of General Counsel, FINRA, to Lourdes Gonzalez, Assistant Chief Counsel, Division of Trading and Markets, Commission, dated December 9, 2020.

<sup>6</sup> A "hearing session" is any meeting between the parties and arbitrator(s) of four hours or less, including a hearing or a prehearing conference. See FINRA Rules 12100(p) and 13100(p).

<sup>7</sup> For example, during a typical arbitration, the Chair oversees the discovery process, conducts the initial prehearing conference ("IPHC") and subsequent prehearing conferences as needed, drafts rulings and orders, and manages efficient hearings. See Notice at note 4.

<sup>8</sup> See FINRA Rule 12214(a)(2). The term "hearing" means the hearing on the merits of an arbitration under FINRA Rules 12600 and 13600. See FINRA Rules 12100(o) and 13100(o).

day, regardless of the number of hearing sessions held per day.<sup>9</sup> Currently, Chairs do not receive an additional honorarium for prehearing conferences, which they are required to lead and for which they are required to perform additional tasks, such as setting discovery, briefing, and motion deadlines, scheduling subsequent hearing sessions, and drafting prehearing orders.<sup>10</sup>

A. Proposed Increases to Arbitrator Chair Honoraria

The proposed rule change would amend FINRA Rules 12214 and 13214 to increase the arbitrator Chair honoraria. Specifically, the proposed rule change would increase the hearing day honorarium from \$125 to \$250 to better compensate the Chair for the additional training and responsibilities required of the position. In addition, the proposed rule change would establish a new honorarium to pay a Chair an additional \$125 for each prehearing conference in which he or she participates. Under the proposed rule change, Chairs would receive the additional prehearing conference compensation even if an arbitration case closes without a hearing. For example, if the Chair participates in a prehearing conference,<sup>11</sup> but the parties settle the case, the Chair would still receive some compensation for serving as Chair.

B. Proposed Increases to Arbitration Fees

To fund increases in the arbitrator Chair honoraria, the proposed rule change would also increase the member surcharge, member process fees, filing fees, and hearing session fees that the forum assesses the parties during the course of an arbitration case.

1. Proposed Increases to Member Surcharge

Under FINRA Rules 12901 and 13901, FINRA assesses a surcharge against each member that: (1) files a claim, counterclaim, cross claim, or third party claim under the Codes; (2) is named as a respondent in a claim, counterclaim, cross claim, or third party claim filed and served under the Codes; or (3) employed, at the time the dispute arose, an associated person who

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<sup>9</sup> A typical day has two hearing sessions. See Notice at note 3.

<sup>10</sup> See FINRA Rules 12500(c) and 13500(c).

<sup>11</sup> See FINRA Rules 12500(a) and 13500(a).

is named as a respondent in a claim, counterclaim, cross claim, or third party claim filed and served under the Codes. Member surcharges are intended to allocate the costs of administering the arbitration case to the firms that are involved in those cases.<sup>12</sup> Because the cost of administering an arbitration case generally is proportional to the aggregate claim amount,<sup>13</sup> the member surcharge increases with the size of the claim amount.<sup>14</sup> Proposed FINRA Rules 12901 and 13901 would increase the member surcharge for claims of more than \$250,000 and claims for non-monetary or unspecified damages. Table 1 illustrates the proposed dollar and percentage changes for each tier.<sup>15</sup>

Member Surcharge Schedule – Table 1

Amount of Claim (exclusive of interest and expenses)	Current Surcharge	Proposed Fee	Change	Percentage Change
\$.01 to \$5,000	\$150	\$150	\$0	0%
\$5,000.01 – \$10,000	\$325	\$325	\$0	0%
\$10,000.01 – \$25,000	\$450	\$450	\$0	0%
\$25,000.01 – \$50,000	\$750	\$750	\$0	0%
\$50,000.01 – \$100,000	\$1,100	\$1,100	\$0	0%
\$100,000.01 – \$250,000	\$1,700	\$1,700	\$0	0%
\$250,000.01 – \$500,000	\$1,900	\$2,025	\$125	7%
\$500,000.01 – \$1,000,000	\$2,475	\$2,625	\$150	6%
\$1,000,000.01 – \$5,000,000	\$3,025	\$3,200	\$175	6%
\$5,000,000.01 – \$10,000,000	\$3,600	\$3,850	\$250	7%
Over \$10,000,000	\$4,025	\$4,325	\$300	7%
Non-Monetary/Not Specified	\$1,900	\$2,000	\$100	5%

<sup>12</sup> See Notice at 67796. The member surcharge is the responsibility of the member party and cannot be allocated to any other party (“non-allocable”). See FINRA Rules 12901(a)(6) and 13901(f).

<sup>13</sup> See Notice at 67796.

<sup>14</sup> Id.

<sup>15</sup> Id.

## 2. Proposed Increases to Filing Fee

Under FINRA Rules 12900(a)(1) and 13900(a)(1), if a customer, associated person or other non-member files a claim, counterclaim, cross claim, or third party claim, they must pay a filing fee to initiate an arbitration. As with member surcharges, the filing fee is based on the claim amount or type of damages requested.<sup>16</sup> The proposed rule change would amend FINRA Rules 12900 and 13900 to increase the filing fees for customers, associated persons or other non-members bringing claims of more than \$500,000 and claims for non-monetary or unspecified damages. Table 2 shows the proposed dollar and percentage changes.<sup>17</sup>

Filing Fees for Customers, Associated Persons or Other Non-Member Claimants –

Table 2

Amount of Claim (exclusive of interest and expenses)	Current Claim Filing Fee	Proposed Claim Filing Fee	Change	Percentage Change
\$.01 to \$1,000	\$50	\$50	\$0	0%
\$1,000.01 – \$2,500	\$75	\$75	\$0	0%
\$2,500.01 – \$5,000	\$175	\$175	\$0	0%
\$5,000.01 – \$10,000	\$325	\$325	\$0	0%
\$10,000.01 – \$25,000	\$425	\$425	\$0	0%
\$25,000.01 – \$50,000	\$600	\$600	\$0	0%
\$50,000.01 – \$100,000	\$975	\$975	\$0	0%
\$100,000.01 – \$500,000	\$1,425	\$1,425	\$0	0%
\$500,000.01 – \$1,000,000	\$1,725	\$1,740	\$15	1%
\$1,000,000.01 – \$5,000,000	\$2,000	\$2,025	\$25	1%
Over \$5,000,000	\$2,250	\$2,300	\$50	2%
Non-Monetary/Not Specified	\$1,575	\$1,600	\$25	2%

The proposed rule change would also amend FINRA Rules 12900(b) and 13900(b) to increase the filing fees that members pay for claims of more than \$500,000 and claims for non-

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<sup>16</sup> See FINRA Rules 12900(a)(1) and 13900(a)(1).

<sup>17</sup> See Notice at 67797.

monetary or unspecified damages. Table 3 shows the proposed dollar and percentage changes.<sup>18</sup>

Filing Fees for Member Claimant – Table 3

Amount of Claim (exclusive of interest and expenses)	Current Claim Filing Fee	Proposed Claim Filing Fee	Change	Percentage Change
\$.01 to \$1,000	\$225	\$225	\$0	0%
\$1,000.01 – \$2,500	\$350	\$350	\$0	0%
\$2,500.01 – \$5,000	\$525	\$525	\$0	0%
\$5,000.01 – \$10,000	\$750	\$750	\$0	0%
\$10,000.01 – \$25,000	\$1,050	\$1,050	\$0	0%
\$25,000.01 – \$50,000	\$1,450	\$1,450	\$0	0%
\$50,000.01 – \$100,000	\$1,750	\$1,750	\$0	0%
\$100,000.01 – \$500,000	\$2,125	\$2,125	\$0	0%
\$500,000.01 – \$1,000,000	\$2,550	\$2,650	\$100	4%
\$1,000,000.01 – \$5,000,000	\$3,400	\$3,550	\$150	4%
Over \$5,000,000	\$4,000	\$4,200	\$200	5%
Non-Monetary/Not Specified	\$1,700	\$1,800	\$100	6%

### 3. Proposed Increases to Process Fee

Under FINRA Rules 12903 and 13903, each member that is a party to an arbitration or employed an associated person who is a party to an arbitration in which the claim amount is more than \$25,000 must pay a process fee based on the amount of the claim.<sup>19</sup> The proposed rule change would amend FINRA Rules 12903 and 13903 to increase the member process fees for claim amounts larger than \$250,000 and for claims for non-monetary or unspecified damages. Table 4 illustrates the proposed dollar and percentage changes.<sup>20</sup>

Member Process Fee Schedule – Table 4

<sup>18</sup>

Id.

<sup>19</sup>

Like the member surcharge, the process fee is non-allocable to other parties to the arbitration. See FINRA Rules 12903(d) and 13903(d). See also FINRA Rules 12701(b) and 13701(b).

<sup>20</sup>

See Notice at 67797.

Amount of Claim (exclusive of interest and expenses)	Current Process Fee	Proposed Fee	Change	Percentage Change
\$.01 – \$25,000	\$0	\$0	\$0	0%
\$25,000.01 – \$50,000	\$1,750	\$0	\$0	0%
\$50,000.01 – \$100,000	\$2,250	\$0	\$0	0%
\$100,000.01 – \$250,000	\$3,250	\$0	\$0	0%
\$250,000.01 – \$500,000	\$3,750	\$3,875	\$125	3%
\$500,000.01 – \$1,000,000	\$5,075	\$5,225	\$150	3%
\$1,000,000.01 – \$5,000,000	\$6,175	\$6,375	\$200	3%
\$5,000,000.01 – \$10,000,000	\$6,800	\$7,050	\$250	4%
Over \$10,000,000	\$7,000	\$7,300	\$300	4%
Non-Monetary/Not Specified	\$3,750	\$3,850	\$100	3%

#### 4. Proposed Increases to Hearing Session Fee

Under FINRA Rules 12902(a) and 13902(a), FINRA assesses hearing session fees against the parties for each hearing and pre-hearing session conducted by a panel.<sup>21</sup> In the award, the panel determines the amount of the hearing session fees that each party is required to pay.<sup>22</sup> The arbitrators may apportion the fees in any manner, including assessing the entire amount against one party.<sup>23</sup> The proposed rule change would amend FINRA Rules 12902 and 13902 to increase the fees for claims of more than \$500,000 and for claims for non-monetary or unspecified damages. There are different hearing session fees for hearings with one arbitrator versus hearings with three arbitrators. Under the proposed rule change, the fees would not change for hearings with one arbitrator. Table 5 illustrates the proposed dollar and percentage changes.<sup>24</sup>

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<sup>21</sup> See supra note 8.

<sup>22</sup> The term “panel” means the arbitration panel, whether it consists of one or more arbitrators. See FINRA Rules 12100(u) and 13100(s).

<sup>23</sup> See FINRA Rules 12902(a)(1) and 13902(a)(1).

<sup>24</sup> See Notice at 67798.

Hearing Session Fees for Session with Three Arbitrators – Table 5

Amount of Claim (exclusive of interest and expenses)	Current Fee for Session W/Three Arbitrators	Proposed Fee for Session W/Three Arbitrators	Change	Percentage Change
Up to \$2,500	NA	NA	NA	NA
\$2,500.01 – \$5,000	NA	NA	NA	NA
\$5,000.01 – \$10,000	NA	NA	NA	NA
\$10,000.01 – \$25,000	NA	NA	NA	NA
\$25,000.01 – \$50,000	\$600	\$600	\$0	0%
\$50,000.01 – \$100,000	\$750	\$750	\$0	0%
\$100,000.01 – \$500,000	\$1,125	\$1,125	\$0	0%
\$500,000.01 – \$1,000,000	\$1,300	\$1,325	\$25	2%
\$1,000,000.01 – \$5,000,000	\$1,400	\$1,435	\$35	3%
Over \$5,000,000	\$1,500	\$1,575	\$75	5%
Non-Monetary/Not Specified	\$1,125	\$1,150	\$25	2%

### C. Technical Changes

The proposed rule change would amend FINRA Rules 12901 and 13901 to make the formatting more consistent in the fee schedules. In addition, the proposed rule change would amend FINRA Rule 12900(c)(3) to change the cross-reference in the rule from Rule 12202(c) to Rule 12202.

### III. Discussion and Commission Findings

After careful review of the proposed rule change and the comment letter, the Commission finds that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder that are applicable to a national securities association.<sup>25</sup> Specifically, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Exchange Act,<sup>26</sup> which requires, among other things, that FINRA rules be

<sup>25</sup> In approving this rule change, the Commission has considered the rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>26</sup> 15 U.S.C. 78o-3(b)(6).

designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest, and Section 15A(b)(5) of the Exchange Act,<sup>27</sup> which requires, among other things, that FINRA rules provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system that FINRA operates or controls.

A. Protection of Investors and the Public Interest

FINRA's proposed rule change aims to address concerns related to recruiting and retaining arbitrators for its forum roster, including increasing the probability that local public Chairs would be proposed for selection. FINRA stated that Chair-eligible arbitrators have indicated that they are not interested in completing the required Chair training and serving on the Chair roster because of the extra work required compared to the modest, additional Chair honorarium currently offered.<sup>28</sup> And forum users have expressed concern with empaneling non-local public arbitrators to Chair their proceedings.<sup>29</sup> FINRA believes that increasing the current per-day Chair honorarium for hearings on the merits and establishing a Chair honorarium for prehearing conferences would provide more of an incentive for eligible arbitrators to become Chairs and to more adequately compensate Chairs for their additional work.<sup>30</sup> The commenter agrees with FINRA, stating that increasing the additional hearing day honorarium that Chairs receive for each hearing on the merits, would "provide more of an incentive for both new and experienced arbitrators to become Chairs, would increase the number of arbitrators on the Chair roster and will serve to reduce the number of non-local Chair arbitrators all of which will expand the quality and depth of the arbitrator roster which is a critical component for protecting

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<sup>27</sup> 15 U.S.C. 78o-3(b)(5).

<sup>28</sup> See Notice at 67795.

<sup>29</sup> Id.

<sup>30</sup> See Notice at 67799.

investors and the public interest.”<sup>31</sup> The commenter also believes that the proposal rule change would “more adequately compensate Chairs for their additional work.”<sup>32</sup>

The Commission acknowledges FINRA’s concern that fewer Chair-eligible arbitrators may be taking on the additional burdens of being on the Chair roster due to insufficient compensation. The Commission believes that increasing the amount that FINRA compensates its Chair-eligible arbitrators may incentivize them to take on the additional training and responsibilities associated with the position.<sup>33</sup> Consequently, FINRA may be able to recruit new, and retain current, Chairs for its roster, potentially alleviating the shortage of Chairs in certain locations and the concomitant negative impact (e.g., dissatisfied parties and scheduling delays).

#### B. Equitable Allocation of Reasonable Fees

FINRA stated that the proposed increases to Chair honoraria would increase its expenses for operating the forum by approximately \$1.1 million.<sup>34</sup> To offset these expenses, the proposed rule change would increase fees charged to parties for using its arbitration forum. In particular, the proposed rule change would increase the member surcharge, member process fees, filing fees, and hearing session fees. As illustrated above, FINRA would increase the member

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<sup>31</sup> Caruso Letter.

<sup>32</sup> Id. (stating that the proposed \$125 Chair honorarium for each prehearing conference in which the Chair participates would compensate Chairs who do not currently receive an additional honorarium for prehearing conferences, even though Chairs are required to lead the prehearing conferences and perform additional tasks in connection with the prehearing conferences, such as setting discovery, briefing, and motion deadlines, scheduling subsequent hearing sessions, drafting prehearing orders, and rendering decisions on discovery and other case-related motions).

<sup>33</sup> To qualify as a Chair, an arbitrator must complete Chair training and have served on at least three arbitrations through award in which hearings were held, or be a lawyer who served on at least one arbitration through award in which hearings were held. See FINRA Rules 12400(c) and 13400(c); see also supra note 10 and accompanying text.

<sup>34</sup> From 2014 through 2019, FINRA paid the hearing day honorarium on an average of 2,569 times per year. In order to fund the proposed hearing day honorarium increase from \$125 to \$250, FINRA would need to raise revenue by approximately \$368,000 annually. See Notice at note 12. From 2014 through 2019, FINRA conducted an average of 4,954 prehearing conferences per year. In order to pay the proposed additional Chair prehearing honorarium of \$125, FINRA would need to raise revenue by approximately \$724,000 annually. See Notice at note 15.

surcharge and process fees for claims of more than \$250,000 or claims for non-monetary or unspecified damages. The proposed rule change would also increase filing fees and hearing session fees for customers, associated persons and members bringing claims of more than \$500,000 or claims for non-monetary or unspecified damages. FINRA believes the proposed rule change appropriately allocates the proposed fee increases among users of the forum by allocating the increases among high claim amounts and continuing its policy that the costs of the forum are borne 85 percent by members and 15 percent by customers.<sup>35</sup>

FINRA also believes the amount of the fee increases are reasonable. FINRA believes that the proposed fee increases would generate sufficient revenue to offset the proposed increases in the arbitrator Chair honoraria without placing an undue burden on users of the forum, particularly customers and claimants with small claims.<sup>36</sup> For example, the filing fee increases for non-member claimants will range from \$15 to \$50 (1%-2% increase);<sup>37</sup> the hearing session fee increases will range from \$25 to \$75 (2%-5% increase);<sup>38</sup> the increases to the member surcharge will range from \$100 to \$300 (3%-4% increase);<sup>39</sup> and the filing fee increases for member claimants will range from \$100 to \$200 (4%-6% increase).<sup>40</sup> FINRA believes these represent “minimal” increases.<sup>41</sup> Similarly, the commenter believes that increasing the filing fees and hearing session fees for customers, associated persons, and members bringing claims of more than \$500,000 or claims for non-monetary or unspecified damages, is a fair, equitable and

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<sup>35</sup> See Notice at 67799; see also Notice at note 9 (stating that the FINRA Dispute Resolution Task Force suggested raising arbitration fees to fund arbitrator honoraria increases consistent with the current arbitration fee structure, which assigns a majority of the costs of the forum to firms through the member surcharge and process fees).

<sup>36</sup> See Notice at 67796.

<sup>37</sup> See Table 2 (Filing Fees for Customers, Associated Persons or Other Non-Member Claimants) supra; see also Notice at 67797.

<sup>38</sup> See Table 5 (Hearing Session Fees for Session with Three Arbitrators) supra; see also Notice at 67798.

<sup>39</sup> See Table 4 (Member Process Fee Schedule) supra; see also Notice at 67797.

<sup>40</sup> See Table 3 (Filing Fees for Member Claimant) supra; see also Notice at 67797.

<sup>41</sup> See Notice at 67794.

reasonable allocation of the costs among people using the forum that will be associated with the implementation of the proposed rule amendments.<sup>42</sup>

The Commission believes that increasing the amount of honoraria paid to arbitrators who chair hearings and pre-hearing conferences in the FINRA forum as proposed here would help improve the arbitration process for its users. To offset the costs of this improvement, FINRA designed the arbitration fee structure to distribute much of the increased costs of the forum to member firms that are parties to an arbitration proceeding and to parties associated with large claims or non-monetary or unspecified claims. The Commission believes that this proposed distribution of fees will help keep the FINRA arbitration forum accessible. Otherwise, the Commission believes that increasing fees on claimants with small claims could discourage retail investors from bringing their claims.<sup>43</sup> Accordingly, the proposed allocation of the fee increases will help ensure that FINRA's arbitration forum remains accessible and affordable to parties.

As stated above, the filing fee increases for non-member claimants will range from \$15 to \$50; the hearing session fee increases will range from \$25 to \$75; the increases to the member surcharge will range from \$100 to \$300; and the filing fee increases for member claimants range from \$100 to \$200. Because these increases would only apply to claims over \$250,000 and, in some instances, over \$500,000, they represent a small percentage of effected claims (collectively, 1%-6%).

The Commission believes that the proposed rule change is consistent with the Exchange Act. In particular, the Commission believes that the proposed rule change is appropriate and designed to protect investors and the public interest, consistent with Section 15A(b)(6) of the Exchange Act. Specifically, the Commission believes that the proposed increase to the hearing day Chair honorarium and the addition of a Chair honorarium for prehearing conferences are in the public interest because they would help improve the arbitration process for its users,

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<sup>42</sup> See Caruso Letter.

<sup>43</sup> See Notice at 67801.

including retail investors. Moreover, the Commission believes that the proposed fee increases represent an equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, consistent with Section 15A(b)(5). For these reasons, the Commission finds that the proposed rule change is consistent with the Exchange Act and the rules and regulations thereunder.

IV. Conclusion

IT IS THEREFORE ORDERED pursuant to Section 19(b)(2) of the Exchange Act<sup>44</sup> that the proposal (SR-FINRA-2020-035), be and hereby is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>45</sup>

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2020-28310 Filed: 12/22/2020 8:45 am; Publication Date: 12/23/2020]

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<sup>44</sup> 15 U.S.C. 78s(b)(2).

<sup>45</sup> 17 CFR 200.30-3(a)(12).